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The Buck Stops Here: Peaceable Repossession Is a Nondelegable Duty

*Robinson v. Citicorp National Services, Inc.*¹

I. INTRODUCTION

A secured party has the right to take possession of the collateral if the debtor defaults.² “In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace”³ Relying on this language, secured creditors often repossess collateral without judicial process. Many times they hire independent contractors to repossess the collateral from defaulting parties. Secured creditors believe they are shielded from liability by hiring independent contractors to perform repossessions.⁴

Robinson v. Citicorp National Services, Inc. makes it unlikely that a secured creditor will avoid liability in Missouri by hiring an independent contractor to repossess collateral.⁵ *Robinson* imposes a nondelegable duty on a secured creditor to peaceably effect repossession.⁶ This is bad news for secured creditors but even worse news for potential borrowers.

II. FACTS AND HOLDING

Citicorp National Services, Inc. hired M & M Agency, Inc. to repossess Clarence Robinson’s automobile after he became unable to pay the required monthly installments pursuant to his purchase contract.⁷ Employees of M & M Agency, Inc. found the car parked on property owned by Odell and Marie Robinson and attempted to repossess the automobile.⁸ Odell, who was present at the time of the repossession, repeatedly told the employees to get off the

1. 921 S.W.2d 52 (Mo. Ct. App. 1996).

2. MO. REV. STAT. § 400.9-503 (1994).

3. MO. REV. STAT. § 400.9-503 (1994).

4. See generally RESTATEMENT (SECOND) OF TORTS § 370 (1965).

5. *Robinson*, 921 S.W.2d at 54-55.

6. *Id.*

7. *Id.* at 53. Citicorp and M & M had previously entered into an independent contractor agreement whereby M & M would provide repossession services for Citicorp on a per job basis. *Id.* Citicorp had requested that M & M repossess the automobile parked on the property owned by the Robinsons pursuant to that agreement. *Id.* Clarence Robinson purchased the automobile from Bommarito Hyundai. *Id.* Under the terms of the purchase contract, the automobile was to be paid for in monthly installments. *Id.* Bommarito held a security interest in the automobile and subsequently assigned its security interest to Citicorp. *Id.* Thereafter, Clarence became unable to pay the required monthly installments. *Id.*

8. *Id.*

property to no avail.⁹ An alleged trespass and breach of peace ensued, and Odell suffered a heart attack and died.¹⁰

Marie Robinson subsequently filed suit against Citicorp in the Circuit Court of St. Louis County, asserting claims for wrongful death, breach of peace, and trespass.¹¹ Robinson claimed that Citicorp was liable for the actions of M & M Agency, Inc.¹² Citicorp moved for summary judgment, asserting that M & M Agency, Inc. was an independent contractor for whom Citicorp bore no responsibility.¹³ The trial court granted summary judgment in favor of Citicorp.¹⁴ In reversing the trial court, the Missouri Court of Appeals for the Eastern District held that Section 400.9-503 of the Missouri Revised Statutes specifically imposes a nondelegable duty on a secured creditor pursuing nonjudicial repossession to pursue it in a peaceable manner.¹⁵ *Robinson* is the first decision in Missouri to consider the issue of whether a secured creditor may delegate liability for wrongful death, breach of peace, and trespass by hiring an independent contractor to perform the repossession pursuant to Section 400.9-

9. *Id.*

10. *Id.*

11. *Id.* Robinson also asserted claims for breach of peace and trespass against M & M. *Id.*

12. *Id.*

13. *Id.* at 54. In support of its motion, Citicorp made specific references to the depositions of Roger Martin, the president of M & M, and Kenneth Lee Reichardt, an employee. *Id.* Citicorp also made specific references to the independent contractor agreement, as well as to responses made by M & M to its requests for admissions. *Id.* Robinson filed a response to Citicorp's motion "essentially denying its substantive paragraphs" and making specific references to the independent contractor agreement, her deposition, and the depositions of Martin, Reichardt, and Steven Brinkman, an employee of M & M. *Id.*

14. *Id.*

15. *Id.* at 54-55. Missouri has adopted Section 9-503 of the Uniform Commercial Code at MO. REV. STAT. § 400.9-503 (1994). *Id.* at 54. Section 400.9-503 provides in pertinent part:

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action.

MO. REV. STAT. § 400.9-503 (1994).

The Missouri Court of Appeals held that the duty to peacefully repossess property was "specifically imposed" on a secured party, and, therefore, seems to have utilized the exception stated in the RESTATEMENT (SECOND) OF TORTS § 424 (1965) that prohibits the delegation of a specific duty imposed by statute or contract. *Robinson v. Citicorp Nat'l Servs., Inc.*, 921 S.W.2d 52, 54 (Mo. Ct. App. 1996) (citing RESTATEMENT (SECOND) OF TORTS § 424 (1965)). Section 424 provides that a person under a statutory duty to provide specific safeguards or precautions for the safety of another is liable for injuries to the other person caused by a contractor's failure to provide the necessary safeguards or precautions. RESTATEMENT (SECOND) OF TORTS § 424 (1965).

503.¹⁶ The Missouri Supreme Court denied Robinson's motion for rehearing and transfer.¹⁷

III. LEGAL BACKGROUND

The term "independent contractor" is defined in many different ways.¹⁸ Courts usually define an independent contractor as one who contracts to do certain work according to the independent contractor's own methods, without being subject to the control of the employer, except as to the product or result of the work.¹⁹ Generally, an employer is not liable for physical harm caused to a third party by an act or omission of an independent contractor or his servants.²⁰ However, courts recognize some exceptions to the general rule.²¹ The exceptions generally fall into the following three categories: (1) nondelegable duties of the employer arising out of an employer's obligation, either by contract or law, to a particular person or to the public;²² (2) negligence of the employer in selecting, instructing, or supervising the contractor;²³ and (3) work which is specially, peculiarly, or inherently dangerous.²⁴

16. *Robinson*, 921 S.W.2d at 54.

17. *Id.* at 52.

18. *See generally* 41 AM. JUR. 2D *Independent Contractors* § 1 (1968).

19. *See* 41 AM. JUR. 2D *Independent Contractors* § 1 (1968); *see also* *Ross v. St. Louis Dairy Co.*, 98 S.W.2d 717 (Mo. 1938) (holding a trucking company to be an independent contractor where it contracted with a dairy company to transport milk from the latter's plant to the city and deliver it to the dairy company's place of business); *Baldwin v. Gianladis*, 159 S.W.2d 706 (Mo. Ct. App. 1942) (stating an independent contractor is one who acts under an independent employment contract to work according to his own methods and without being subject to the control of his employer, except as to the result of his work).

20. *See* RESTATEMENT (SECOND) OF TORTS § 370 (1965). The trial court undoubtedly relied on this rule in granting summary judgment for Citicorp. *Robinson v. Citicorp Nat'l Servs., Inc.*, 921 S.W.2d 52, 54 (Mo. Ct. App. 1996).

21. *See* RESTATEMENT (SECOND) OF TORTS §§ 410-429 (1965) (citing the complete list of exceptions).

22. *See* RESTATEMENT (SECOND) OF TORTS §§ 410-429 (1965). This exception is commonly referred to as the nondelegable duty exception. *See infra* notes 25-34 and accompanying text.

23. *See* RESTATEMENT (SECOND) OF TORTS §§ 410-429 (1965). This exception is usually referred to as the negligent hiring exception. Although this exception is not discussed in this Note, the reader should recognize that the negligent hiring exception has been used to hold employers vicariously liable. *See, e.g., Sullivan v. St. Louis Station Assocs.*, 770 S.W.2d 352, 356 (Mo. Ct. App. 1989); *Springdale Gardens v. Countryland Dev., Inc.*, 638 S.W.2d 813, 816-17 (Mo. Ct. App. 1982).

24. *See* RESTATEMENT (SECOND) OF TORTS §§ 410-429 (1965). This exception is referred to as the inherently dangerous activity exception. Although this exception is not discussed in this Note, the reader should recognize that the inherently dangerous activity

The nondelegable duty exception²⁵ creates employer liability for the negligence of an independent contractor, even if the employer is not actually at fault.²⁶ A nondelegable duty arises when, for reasons concerning public policy, the employer is not permitted to shift the responsibility for the proper execution of the work to the independent contractor.²⁷ A nondelegable duty may be created when a statute or administrative regulation imposes a duty upon an employer overseeing particular types of work to provide specific safeguards or precautions for the safety of others.²⁸ Ordinarily, the language of the statute or ordinance must subject the employer to a definite obligation.²⁹ Therefore, the duty imposed must be specifically identified in the statute.³⁰ Usually, a general duty created under a statute or ordinance is nondelegable because no specific safeguards or precautions are set forth in the statute.³¹

Two types of statutes and regulations are in the nondelegable duty category.³² The first type imposes an absolute duty upon those doing the work

exception has been used to hold employers vicariously liable. *See, e.g., Kelly v. St. Luke's Hosp.*, 826 S.W.2d 391 (Mo. Ct. App. 1992) (holding the practice of emergency medicine not to be an inherently dangerous activity); *Nance v. Leritz*, 785 S.W.2d 790 (Mo. Ct. App. 1990) (holding as inherently dangerous activity requiring a subcontractor working on the exterior of a building to use staging rather than a ground-supported extension ladder). The Missouri Supreme Court established the test for determining whether an activity is inherently dangerous in *Smith v. Inter-County Telephone Co.*, 559 S.W.2d 518 (Mo. 1977). The court stated:

[I]f the doing of the work necessarily causes dangers which must be guarded against, then the employer must see to it that such dangers are guarded against, and cannot relieve himself by casting this duty on an independent contractor. If, however, the work is dangerous only by reason of negligence in doing it, then the liability falls only on the independent contractor. In the one case the doing of the work creates danger and requires active care to counteract the danger. In the other there is no danger unless created by negligence.

Id. at 522 (quoting *Carson v. Blodgett Constr. Co.*, 174 S.W.2d 447, 448 (1915)).

25. *See supra* note 22; *see also infra* notes 26-34.

26. *See* RESTATEMENT (SECOND) OF TORTS §§ 411-439 (1965).

27. *See* RESTATEMENT (SECOND) OF TORTS §§ 411-439 (1965).

28. *See* RESTATEMENT (SECOND) OF TORTS § 411 (1965).

29. 41 AM.JUR.2D *Independent Contractors* § 38 (1968). "[T]he terms of the statute . . . in question must be of such a tenor as to subject [the employer] to a definite obligation . . ." *Williamson v. Southwestern Bell Tel. Co.*, 265 S.W.2d 354, 357 (Mo. 1954).

30. *See* RESTATEMENT (SECOND) OF TORTS § 424 (1965).

31. *See* RESTATEMENT (SECOND) OF TORTS § 424 (1965).

32. *See* RESTATEMENT (SECOND) OF TORTS § 424 (1965).

to provide for the specified safeguards or precautions.³³ The second merely imposes a duty to use reasonable care to provide the specified safeguards.³⁴

The Alabama Supreme Court was the first of two state supreme courts to address the issue of whether a secured creditor pursuing nonjudicial repossession has a nondelegable duty to do so peaceably.³⁵ In *General Finance Corp. v. Smith*,³⁶ a debtor defaulted on a loan and the secured creditor hired a repossession service to retrieve the collateral.³⁷ During the repossession, the service breached the peace.³⁸ The plaintiff sued, and the defendant bank claimed that it was not liable because the repossession service was an independent contractor.³⁹

The Alabama Supreme Court was the first court to hold that torts arising from self-help repossession should be dealt with through the use of the nondelegable duty exception.⁴⁰ The court recognized a nondelegable duty, absent a specific contractual or statutory duty.⁴¹ The court identified the nondelegable duty exception,⁴² but admitted that the legislature did not set out specific "safeguards or precautions which a secured party must take in order to effect a peaceful repossession."⁴³ However, the court held that by implication, "a secured party is under a duty to take those precautions which are necessary at the time to avoid a breach of the peace."⁴⁴ Prior to *General Finance*, Alabama, like most other jurisdictions, only utilized the nondelegable duty exception when an employer, either by contract or law, owed certain specific obligations to the public.⁴⁵

33. See RESTATEMENT (SECOND) OF TORTS § 424 (1965). If the duty is absolute, the employer is subject to liability for the failure of the contractor to provide the required safeguard or precaution. See RESTATEMENT (SECOND) OF TORTS § 424 (1965). Liability is imposed upon the employer even though the contractor exercised all reasonable care to supply the particular safeguard or precaution. See RESTATEMENT (SECOND) OF TORTS § 424 (1965).

34. See RESTATEMENT (SECOND) OF TORTS § 424 (1965). If the duty is one of reasonable care, the employer is subject to liability only if the contractor has failed to exercise such care. See RESTATEMENT (SECOND) OF TORTS § 424 (1965).

35. *General Fin. Corp. v. Smith*, 505 So. 2d 1045 (Ala. 1987).

36. *Id.* at 1045.

37. *Id.* at 1047.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 1047-48.

42. *Id.* at 1047. The court stated: "An employer who by contract or law owes a specific duty to another cannot escape liability for a tortious performance by reason of the employment of an independent contractor." *Id.*

43. *Id.* at 1048.

44. *Id.*

45. This exception was first recognized in *Montgomery Gas-Light Co. v. Montgomery & Eastern Railway*, 5 So. 735 (Ala. 1889). In *Montgomery*, a company

Minnesota courts next recognized the peaceful repossession of an automobile as a nondelegable duty. In *Nichols v. Metropolitan Bank*,⁴⁶ the

placed a freight car on a side track near the plaintiff railway company's main track. *Id.* at 736. Four of the plaintiff's moving rail cars collided with the freight car and were destroyed. *Id.* The court held that the contract concerning the use of the side track created a duty on the part of the defendant to keep it free from obstructions. *Id.* *Montgomery* recognized that a contractual nondelegable duty could be created, making an employer liable for the acts of an independent contractor. *Id.* at 737.

This nondelegable duty was expanded in *Alabama Power Co. v. Pierre*, 183 So. 665 (Ala. 1938). In *Pierre*, the plaintiffs purchased electrical equipment from the defendant power company. *Id.* at 667. The power company agreed to install the equipment in the house without cost to the Pierres. *Id.* at 668. The power company hired an independent contractor to install the electrical equipment. *Id.* The house was then destroyed by a fire caused by the negligent installation of the electrical equipment. *Id.* In holding for the Pierres, the court stated: "[D]efendant cannot escape responsibility for the negligent performance of the installation upon the theory that Bailey was an independent contractor. By contract this installation was a non-delegable duty on defendant's part so far as these plaintiffs were concerned . . ." *Id.* The court thus held that a nondelegable duty could be created by contract even where the independent contractor performed the contract at no extra charge. *Id.*

Alabama's nondelegable duty exception was further developed in *State Farm Mutual Auto Insurance Co. v. Dodd*, 162 So.2d 621 (Ala. 1964). In *Dodd*, State Farm hired an independent contractor to repair Dodd's automobile. *Id.* at 626. The repairs were made negligently, resulting in Dodd's death. *Id.* Based upon the insurance policy, the Alabama Supreme Court held that State Farm had a contractual duty to repair the automobile which could not be delegated to a third party. *Id.*

Robertson v. City of Tuscaloosa, 413 So. 2d 1064 (Ala. 1982), resulted in another development of the nondelegable duty exception in Alabama. In *Robertson*, the plaintiff filed an action against the city, the humane society, and the society's employee for killing his cow. *Id.* at 1065. The Alabama Supreme Court held that the duty of animal control was a delegable duty given to the humane society as a independent contractor. *Id.* at 1066. The court defined a nondelegable duty as "a specific duty imposed on the municipality by statute." *Id.* The development in *Robertson* reiterated the fact that in order for a duty to be nondelegable under the exception to the general rule of employer nonliability, the statutory duty must be specific.

46. 435 N.W.2d 637 (Minn. Ct. App. 1989). In *Nichols*, the plaintiff purchased an automobile for his daughter Kim and financed it with a loan obtained from Metropolitan Bank. *Id.* at 638. Mr. Nichols defaulted on the car loan, and the bank hired an independent contractor, R.J. Control Service, to repossess the vehicle. *Id.* R.J. Control sent two employees named Nelson and Vedder to seize the car. *Id.* at 638-39. Nelson and Vedder waited at the Nichols residence and approached Kim Nichols as she drove the car into her driveway and demanded that she surrender the car. *Id.* at 639. She refused, and Nelson reached through the open car window and grabbed Nichols' hand as she held the keys in the ignition. *Id.* Nelson and Vedder took the keys from Nichols and drove the car away. *Id.* Gary and Kim Nichols brought an action against Metropolitan Bank, R.J. Control Service, and Nelson and Vedder, asserting that they were entitled to damages for injuries to Kim Nichols' hand and wrist upon several theories, including assault and battery. *Id.* Metropolitan Bank moved for summary judgment, asserting that

Minnesota Court of Appeals held that the duty to peacefully repossess property was “specifically imposed on a ‘secured party.’” The court utilized the exception contained in Section 424 of the Restatement (Second) of Torts⁴⁷ that prohibits the delegation of a specific duty imposed by statute or contract.⁴⁸ Like Alabama, prior to *Nichols*, Minnesota courts only used the nondelegable duty exception when an employer, either by contract or law, owed certain specific obligations to the public.⁴⁹ The *Nichols* decision thus extended the nondelegable duty exception to include a non-specific duty not to breach the peace imposed by general statutory language.

The Texas Supreme Court was next to address the issue of whether a secured creditor pursuing nonjudicial repossession has a nondelegable duty to do so peaceably.⁵⁰ In *Mbank El Paso N.A. v. Sanchez*,⁵¹ when Yvonne Sanchez defaulted on a note secured by her car, the secured creditor, MBank El Paso,

it was not liable for the damages because R.J. Control Service was an independent contractor, and the lower court granted the motion for summary judgment. *Id.*

47. *Id.* at 640. The court stated: “[A] person under a statutory duty to provide specific safeguards or precautions for the safety of another is liable for injuries to the other person caused by a contractor’s failure to provide the necessary safeguards or precautions.” *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 424 (1965)). Instead of implying that the code specified a statutory duty, as in Alabama, the Minnesota court interpreted the statute as specifically imposing a duty on a secured party. *Id.* at 641. The analysis is somewhat different, but the court reaches the same result. *Id.*

48. *Id.*

49. An early case creating an exception to the general rule of employer non-liability was *Pacific Fire Insurance Co. v. Kenny Boiler & Manufacturing Co.*, 277 N.W. 226 (Minn. 1937). In *Pacific Fire*, the Kenny Boiler Company contracted to manufacture steel plates and attach them to a water tank. *Id.* at 227. Kenny delegated the task of attaching the plates to a third party. *Id.* The tank fell, and the Minnesota Supreme Court held that Kenny owed Pacific Fire a duty to use due care in its work and that this duty was nondelegable. *Id.* at 228. Thus, the *Pacific Fire* court based its decision on a specific contractual duty. *Id.*

This exception was expanded in *Brasch v. Wesolowsky*, 138 N.W.2d 619 (Minn. 1965). Wesolowsky contracted with Brasch to construct the Brasch’s home, but a third party completed the foundation. *Id.* at 621. Considerable cracking later appeared in the foundation, and, thereafter, Brasch sued the general contractor, Wesolowsky, for the work performed by Wesolowsky’s independent contractor. *Id.* The Minnesota Supreme Court held that a general contractor owed a home buyer a nondelegable duty to use due care in the construction of a house. *Id.* 623. The court found that such a duty arose as a result of the contract between the parties. *Id.*

The nondelegable duty exception was also applied in *Westby v. Itasca County*, 290 N.W.2d 437 (Minn. 1980), in which the Minnesota Supreme Court held: “A principal is liable for the negligent performance of a nondelegable duty by an independent contractor, and road maintenance is such a duty.” *Id.* at 438.

50. *Mbank El Paso, N.A. v. Sanchez*, 836 S.W.2d 151 (Tex. 1992).

51. *Id.*

hired El Paso Recovery Service to repossess the car.⁵² During the repossession, Sanchez got into the car and locked the doors.⁵³ El Paso Recovery continued the repossession, towed the car to a repossession yard, and left Sanchez in the lot.⁵⁴ Sanchez filed suit against MBank, alleging that MBank was liable for the torts of El Paso Recovery.⁵⁵ MBank maintained that it was not liable because it delegated its duty not to breach the peace to an independent contractor.⁵⁶

The court rejected MBank's argument, citing to *General Finance*,⁵⁷ *Nichols*,⁵⁸ and the Restatement of Torts for the proposition that parties under a statutory duty to provide certain safeguards cannot delegate such a duty to independent contractors.⁵⁹ The court found that Section 9.503 of the Texas Business and Commercial Code imposed a duty on MBank to take precautions for public safety during a nonjudicial repossession.⁶⁰ Therefore, because a breach of the peace occurred during the repossession of collateral for MBank, MBank was liable even though an independent contractor committed the breach.⁶¹

The Texas Supreme Court recognized that a secured creditor has a strong interest in seizing the collateral securing a defaulted loan.⁶² However, the court balanced the interest of the secured creditor against society's interest in the public peace, stating: "If a creditor chooses to pursue self-help, it must be expected to take precautions in doing so. If this burden is too heavy, the creditor may seek relief by turning to the courts."⁶³ When MBank chose to repossess the collateral without the assistance of the judicial system, "it assumed the risk that a breach of the peace might occur."⁶⁴ As was true of the courts of Alabama and Minnesota, prior to *MBank*, the Texas Supreme Court had never extended the nondelegable duty exception to include any non-specific statutory duty.⁶⁵ Texas

52. *Id.*

53. *Id.*

54. *Id.* The lot was surrounded by a fence and the gate was locked. *Id.* There was also a doberman pinscher guard dog roaming around the lot. *Id.*

55. *Id.*

56. *Id.*

57. *General Fin. Corp. v. Smith*, 505 So. 2d 1045 (Ala. 1987).

58. *Nichols v. Metropolitan Bank*, 435 N.W.2d 637 (Minn. Ct. App. 1989).

59. *MBank El Paso, N.A. v. Sanchez*, 836 S.W.2d 151, 153 (Tex. 1992).

60. *Id.* at 152. Texas has adopted Section 9-503 of the UCC. *See* TEX. BUS. & COM. CODE ANN. § 9-503 (West 1990).

61. *MBank El Paso*, 836 S.W.2d at 153.

62. *Id.* at 154.

63. *Id.*

64. *Id.*

65. Texas courts frequently applied the nondelegable duty exception to impose liability on railroads that hired independent contractors. For example, in *Gulf Coast & San Francisco Railway v. Stephenson*, 273 S.W. 294 (Tex. Civ. App. 1925, no writ), a plaintiff incurred damages to his crops when livestock entered his land through a opening

dealt with torts arising from self-help repossession under the theory of negligent hiring.⁶⁶

In *Sammons v. Broward Bank*,⁶⁷ the Florida Court of Appeals arrived at the same conclusion when it addressed the issue of whether a secured creditor could avoid liability by hiring an independent contractor to accomplish the repossession.⁶⁸ In *Sammons*, Broward Bank financed the purchase of an automobile by Sammons using the same automobile for collateral.⁶⁹ Subsequently, after Sammons defaulted on the loan, the bank hired an independent contractor to repossess the car and a breach of peace ensued.⁷⁰ The court approved and adopted the opinion of the Court of Appeals of Minnesota in *Nichols v. Metropolitan Bank*⁷¹ on this issue.⁷² Therefore, the court held that

in his fence. The railroad was held responsible for the crop damage even though an independent contractor actually tore down the length of fence. *Id.* at 295. The court decided that the statutory duty to give notice upon tearing down fences was nondelegable. *Id.*

In *Quanah, Atlantic & Pacific Railway v. Goodwin*, 177 S.W. 545 (Tex. Civ. App. 1915, writ denied), the court applied the nondelegable duty exception with regard to a statutory duty to repair. In *Quanah*, the railroad owed the general public a statutory duty to keep street crossings in good repair during construction of tracks across the streets. *Id.* at 547. The statute granted a railway the right to cross streets with its tracks but imposed upon it the duty of keeping the crossings in repair. *Id.* The court held that the specific duty to repair could not be shifted to an independent contractor. *Id.*

The court in *Quanah* based its decision on an earlier railroad case, *Texas Midland Railroad v. Johnson*, 50 S.W. 1044, 1045 (Tex. Civ. App. 1899, writ ref'd), which held that the statutory duty to repair roadways could not be delegated to a third party. The statute at issue in *Johnson* expressly required a railroad to restore a highway to its former condition after laying track across it. *Id.* The temporary right of way, built for the public while the highway was under construction, was left in a dangerous condition. *Id.* Because of the specific statutory duty, the court held that the duty to keep the detour road in good repair was nondelegable. *Id.*

66. *See supra* note 23.

67. 599 So. 2d 1018 (Fla. Dist. Ct. App. 1992).

68. *Id.*

69. *Id.*

70. *Id.* While the Sammons were in church, the independent contractor slashed the tires of the car. *Id.* After church, the Sammons drove away before noticing the flat tires. *Id.* The independent contractor, following in another car, then began to play "tag" with the Sammons and kept pursuing them. *Id.* Eventually, the police interjected and arrested Denver Sammons for aggravated assault and leaving the scene of an accident with injuries, based on the independent contractor's claim that Sammons tried to run over them. *Id.*

71. 435 N.W.2d 637 (Minn. Ct. App. 1989).

72. *Sammons v. Broward Bank*, 599 So. 2d 1018, 1019-20 (Fla. Dist. Ct. App. 1992).

a secured creditor cannot avoid liability for a breach of the peace by hiring an independent contractor to perform the repossession.⁷³

Eight other jurisdictions have ruled on self-help repossession cases.⁷⁴ No court has ruled that a secured creditor can delegate the duty to avoid a breach of the peace imposed by Section 9-503 of the UCC to an independent contractor.⁷⁵ Until *Robinson*, no Missouri court had ever decided whether the duty to repossess without a breach of the peace was nondelegable.⁷⁶

73. *Id.* at 1019.

74. See *Henderson v. Security Nat'l Bank*, 140 Cal. Rptr. 388 (1979); *Fulton v. Anchor Sav. Bank*, 452 S.E.2d 208 (Ga. Ct. App. 1994); *Massengill v. Indiana Nat'l Bank*, 550 N.E.2d 97 (Ind. Ct. App. 1990); *DeMary v. Rieker*, 695 A.2d 294 (N.J. Super. Ct. App. Div. 1997); *Mauro v. General Motors Acceptance Corp.*, 626 N.Y.S.2d 374 (N.Y. Sup. Ct. 1995); *McCall v. Owens*, 820 S.W.2d 748 (Tenn. Ct. App. 1991); *Cottam v. Heppner*, 777 P.2d 468 (Utah 1989); *Ragde v. Peoples Bank*, 767 P.2d 949 (Wash. Ct. App. 1989).

75. *DeMary*, 695 A.2d at 301. However, two lengthy dissents in *MBank El Paso, N.A. v. Sanchez*, 836 S.W.2d 151, 155-60 (Tex. 1992) (Cook & Hecht, JJ., dissenting), outlined several theories against nondelegability. In the first *Sanchez* dissent, Judge Cook maintained that the court created strict liability in an area in which it was inappropriate and that the rule would unfairly disadvantage secured creditors who hire independent contractors to carry out repossessions. *Id.* at 155 (Cook, J., dissenting). In the second dissent, Judge Hecht argued that the rule would cause innocent creditors to incur liability in connection with actions of parties over which the creditors had no control and that these added expenses would lead to a substantial increase in the cost of credit. *Id.* at 159 (Hecht, J., dissenting). No state court ruling on the issue of whether the duty to repossess without a breach of the peace is nondelegable has accepted the dissenting arguments in *Sanchez*. *DeMary*, 695 A.2d at 301.

76. Prior to *Robinson*, Missouri courts, like those of Alabama, Minnesota, and Texas, had only used the nondelegable duty exception when an employer, either by contract or law, owed certain specific obligations to the public. In *Williamson v. Southwestern Bell Telephone Co.*, 265 S.W.2d 354, 357 (Mo. 1954), the court stated: "If a duty imposed by statute is relied upon, '[i]n order that the employer may be charged with liability [based on a nondelegable duty] the terms of the statute . . . in question must be of such a tenor as to subject him to a definite obligation . . .'" *Id.* (quoting Annotation, *Liability of Employer as Predicated on the Ground of His Being Subject to a Non-delegable Duty in Regard to the Injured Person*, 23 A.L.R. 984, 989 (1923)).

Missouri courts have frequently applied the nondelegable duty to impose liability on railroads that hired independent contractors. For example, in *McGolderick v. Wabash Railway*, 200 S.W. 74, 75 (Mo. Ct. App. 1917), the court held that it was the duty of the railroad to "keep down the undergrowth along its right of way." The court stated that because the duty was imposed upon the railroad by statute the railroad could not escape liability for injuries to persons caused by the negligence of an independent contractor performing the work. *Id.*

In *Blum v. Airport Terminal Services, Inc.*, 762 S.W.2d 67, 76 (Mo. Ct. App. 1988), the court held that the city of St. Louis had a continuing nondelegable duty to assure that airplane fuel was dispensed safely and that fuel trucks were adequately marked and labeled. The *Robinson* decision extended the nondelegable duty exception to include a

IV. INSTANT DECISION

The Missouri Court of Appeals recognized that the issue of whether a secured creditor can delegate liability for breach of the peace by hiring an independent contractor to perform a repossession had not been addressed in Missouri.⁷⁷ Therefore, the court looked to decisions of other jurisdictions made under the same UCC provision for guidance.⁷⁸ Judge Simon, relying heavily on *General Finance Corp. v. Smith*,⁷⁹ *Nichols v. Metropolitan Bank*,⁸⁰ *MBank El Paso, N.A. v. Sanchez*,⁸¹ and *Sammons v. Broward Bank*,⁸² wrote the opinion of the court.⁸³ The issue, as stated by the Missouri Court of Appeals, was “whether a secured creditor can delegate liability for wrongful death, breach of peace, and trespass by hiring an independent contractor to perform the repossession pursuant to Section 400.9-503.”⁸⁴

Citicorp relied on *Scott v. Ford Motor Credit Corp.*⁸⁵ for the proposition that “a secured creditor who hires a collection agency as an independent contractor cannot be held liable for the collection agency’s negligent acts in repossessing an automobile.”⁸⁶ The Missouri Court of Appeals distinguished *Scott* from the present case, indicating that the court in *Scott* did not address the issue of whether Section 400.9-503⁸⁷ created a nondelegable duty on the part of a secured party to peaceably repossess.⁸⁸

In holding that peaceable self-help repossession is a nondelegable duty, the court first stated that Missouri had adopted Section 9-503 of the Uniform Commercial Code as codified in Section 400.9-503.⁸⁹ The court went on to note

non-specific duty, i.e., to not breach the peace, imposed by general statutory language. *Robinson v. Citicorp Nat’l Servs, Inc.*, 921 S.W.2d 52, 54 (Mo. Ct. App. 1996).

77. *Robinson*, 921 S.W.2d at 54.

78. *Id.* See *supra* notes 35-73 and accompanying text.

79. 505 So. 2d 1045 (Ala. 1987). See *supra* notes 35-45 and accompanying text.

80. 435 N.W.2d 637 (Minn. Ct. App. 1989). See *supra* notes 46-49 and accompanying text.

81. 836 S.W.2d 151 (Tex. 1992). See *supra* notes 50-66 and accompanying text.

82. 599 So. 2d 1018 (Fla. Dist. Ct. App. 1992). See *supra* notes 67-73 and accompanying text.

83. *Robinson v. Citicorp Nat’l Servs., Inc.*, 921 S.W.2d 52, 52 (Mo. Ct. App. 1996).

84. *Id.* at 54.

85. 706 S.W.2d 453 (Mo. Ct. App. 1985). In *Scott*, the independent contractor hired by the secured party repossessed the truck without breaching the peace; therefore the issue presented in the present case was not addressed. *Id.* at 460.

86. *Robinson*, 921 S.W.2d at 55.

87. MO. REV. STAT. § 400.9-503 (1994).

88. *Robinson v. Citicorp Nat’l Servs., Inc.*, 921 S.W.2d 52, 55 (Mo. Ct. App. 1996).

89. *Id.* at 54.

that Section 400.9-503 is substantially similar to Section 9-503 of the UCC.⁹⁰ Judge Simon explained that “where there is a paucity of Missouri case law interpreting a provision of the UCC, courts of this state look for guidance to decisions of other jurisdictions made under the same provision.”⁹¹ Judge Simon identified several cases⁹² from other jurisdictions holding that Section 9-503 of the UCC imposed a nondelegable duty on a secured creditor to repossess peaceably.⁹³ The court noted that these jurisdictions each adopted pertinent statutes regarding a secured party’s duty to peaceably repossess. These statutes are substantially similar to Missouri’s Section 400.9-503.⁹⁴

The court of appeals held that “the duty to repossess property in a peaceable manner is specifically imposed on a secured party by the UCC.”⁹⁵ Therefore, the court held that a secured party may not delegate to third persons, including independent contractors, the secured party’s duty to peaceably repossess.⁹⁶ Judge Simon explained that the rule is intended “to protect debtors and other persons affected by repossession activities.”⁹⁷ He went on to state that “the conditional nature of the secured party’s self-help remedies indicate that a secured party must ensure there is no risk of harm to the debtor and others if the secured party chooses to repossess collateral by self-help methods.”⁹⁸

90. *Id.* See *supra* note 15.

91. *Robinson*, 921 S.W.2d at 54. See also *Interco Inc. v. Randustrial Co.*, 533 S.W.2d 257, 261 (Mo. Ct. App. 1976) (holding that where there is a paucity of Missouri case law interpreting a certain provision of the Uniform Commercial Code, Missouri courts should look for guidance to decisions of other jurisdictions interpreting the same provision).

92. See *supra* notes 35-73 and accompanying text.

93. *Robinson v. Citicorp Nat’l Servs., Inc.*, 921 S.W.2d 52, 54 (Mo. Ct. App. 1996).

94. *Id.*

95. *Id.* at 54-55. Missouri has adopted Section 9-503 of the Uniform Commercial Code. MO. REV. STAT. § 400.9-503 (1994); see *supra* note 16. The Missouri Court of Appeals held that the duty to peacefully repossess property was “specifically imposed on a secured party, and, therefore, seems to have utilized the exception stated in RESTATEMENT (SECOND) OF TORTS § 424 (1965) that prohibits the delegation of a specific duty imposed by statute or contract. *Robinson*, 921 S.W.2d at 54. Section 424 provides that a person under a statutory duty to provide specific safeguards or precautions for the safety of another is liable for injuries to the other person caused by a contractor’s failure to provide the necessary safeguards or precautions. RESTATEMENT (SECOND) OF TORTS § 424 (1965).

96. *Robinson*, 921 S.W.2d at 54-55.

97. *Id.* at 54.

98. *Id.* at 55.

V. COMMENT

According to the Missouri Court of Appeals, Section 400.9-503 of the Missouri Revised Statutes imposes a nondelegable duty on a secured party engaged in self-help repossession to conduct the repossession without breaching the peace.⁹⁹ This holding seems to be based on the realization by courts early in American jurisprudence that the preservation of peace is far more important than an owner regaining possession of a chattel.¹⁰⁰ Although a secured creditor has a strong interest in obtaining collateral from a defaulting debtor, this interest “must be balanced against society’s interest in the public peace.”¹⁰¹ Thus, the Missouri court essentially held that the interest of a secured party in the recovery of collateral is not as strong as the public interest in peace.

This holding will protect the public, and specifically debtors, from possible physical harm resulting from a “botched” repossession for several reasons. Because of the possible liability arising from third party repossession, creditors will be more likely to proceed judicially.¹⁰² Lenders may also choose to use their own employees rather than independent contractors to repossess collateral.¹⁰³ This would give creditors greater control over how the repossession is performed.¹⁰⁴ Finally, secured creditors are in the best position to evaluate available repossession services. *Robinson* will cause secured creditors to be more selective about who they hire to repossess collateral. The fact that secured creditors will be held liable regardless of fault will lead them to hire only the most reputable independent contractors to repossess collateral. This should keep the unsavory repossession services from causing harm to innocent debtors and others who may be in the wrong place at the wrong time, such as Odell Robinson.

However, *Robinson* will have a negative financial impact on potential borrowers. It will increase the cost of automobile loans and make them more difficult to obtain.¹⁰⁵ It will make it more difficult to obtain a loan because lenders will scrutinize the credit histories of potential borrowers more carefully.¹⁰⁶ A greater degree of research will accompany any loan application

99. *Id.*

100. *MBank El Paso, N.A. v. Sanchez*, 836 S.W.2d 151, 152-53 (Tex. 1992).

101. *Id.* at 154.

102. *Id.* at 159. (Hecht, J., dissenting).

103. *Id.*

104. *Id.*

105. *Id.* No reason exists why the *Robinson* holding should be limited to automobile repossession. Repossessions resulting from defaults on furniture, stereos, television sets, and numerous other consumer goods could also be accompanied by a nondelegable duty not to breach the peace.

106. William M. Ucherek, II, *Lenders and Borrowers Beware! Secured Creditors May Not Avoid Liability for Breaches of the Peace by Using an Independent Contractor to Carry Out Repossession*, 24 TEX. TECH. L. REV. 275, 293 (1993).

for fear of default mandating repossession. Lenders may be forced to review the grounds on which loans are approved and denied.¹⁰⁷ The cost of more thorough research will be passed on to the borrower.¹⁰⁸ The decision will have a more severe impact on “high risk” borrowers who cannot afford additional costs for loans or who are denied loans altogether.¹⁰⁹

This holding will also have a negative financial impact on potential borrowers. Upon a debtor’s default, a secured creditor can attempt to regain possession of the collateral in three different ways. Lenders may chose to use their own employees to repossess collateral.¹¹⁰ This gives creditors greater control over how repossessions are performed.¹¹¹ However, this option may be unavailable if the collateral is not located in a creditor’s general vicinity.¹¹² Therefore, lenders may be more reluctant to make loans secured by distant or readily movable collateral.¹¹³

Creditors may also chose to proceed judicially.¹¹⁴ Unfortunately, adjudication can be a slow process, and may be too expensive to pursue.¹¹⁵ judicial repossession will typically take more time than self-help repossession. Creditors must often repossess quickly to prevent damage to the collateral or to prevent loss in the market value of the collateral.¹¹⁶ However, because of the possible liability arising from third party repossession, creditors will be more likely to “choose the more expensive but less risky course of judicial foreclosure as the means of collecting their debts”¹¹⁷ The additional costs that result from a creditor’s decision to proceed judicially will be passed on to borrowers. The decision will also have the detrimental effect of creating more cases for the over-crowded courts.¹¹⁸

Finally, creditors may continue to hire independent contractors to conduct repossessions, as Citicorp did.¹¹⁹ However, after *Robinson*, this option will not be as cost effective because lenders will be forced to insure against potential

107. *Id.*

108. *Id.*

109. *Id.*

110. *Mbank El Paso, N.A. v. Sanchez*, 836 S.W.2d 151, 159 (Tex. 1992) (Hecht, J., dissenting).

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. Ucherek, *supra* note 106, at 293.

117. *Mbank El Paso, N.A. v. Sanchez*, 836 S.W.2d 151, 159 (Tex. 1992) (Hecht, J., dissenting).

118. Ucherek, *supra* note 106, at 293.

119. *Robinson v. Citicorp Nat’l Servs., Inc.*, 921 S.W.2d 52, 53 (Mo. Ct. App. 1996).

torts caused by third party reposseors.¹²⁰ In other words, lenders would effectively become insurers for the torts committed by independent repossession companies hired by them.¹²¹ This additional cost, like so many others, will be passed along to the consumer in the form of interest rates, finance charges, late penalties, etc.¹²² Therefore, the *Robinson* decision will ultimately have a detrimental financial effect on borrowers.¹²³

The court, in *Robinson*, warned lenders that “a secured party must ensure there is no risk of harm to the debtor and others if the secured party chooses to repossess collateral by self-help methods.”¹²⁴ However, the court failed to outline the precautions a creditor is expected to take when pursuing self-help repossession. Therefore, creditors have only one absolutely safe option: judicial repossession.

Whether lenders choose to repossess collateral using their own employees or independent contractors, they will have to insure against breaches of the peace.¹²⁵ This increased cost will be passed on to borrowers.¹²⁶ If a creditor decides to play it safe and proceed judicially, the increased cost will also be passed on to the borrower.¹²⁷ Because peaceable automobile repossession is now a nondelegable duty, lenders will be forced to distribute increased costs to borrowers.¹²⁸ Thus, although the rule was clearly intended to protect borrowers, it will effectively hurt them in the long run.

VI. CONCLUSION

According to the Missouri Court of Appeals, Section 400.9-503 of the Missouri Revised Statutes imposes a nondelegable duty on a secured creditor pursuing self-help repossession to prevent a breach of the peace.¹²⁹ *Robinson* makes it less likely that the public, and specifically debtors, will be physically harmed during a “botched” repossession. However, the holding may result in a decrease in the availability, and an increase in the cost of loans for “high risk” loan applicants. Secured creditors forced to pay for judicial proceedings or for

120. Ucherek, *supra* note 106, at 293.

121. Ucherek, *supra* note 106, at 293.

122. *Mbank El Paso, N.A., v. Sanchez*, 836 S.W.2d 151, 159 (Tex. 1992) (Hecht, J., dissenting).

123. *Id.*

124. *Robinson v. Citicorp Nat’l Servs., Inc.*, 921 S.W.2d 52, 55 (Mo. Ct. App. 1996).

125. Ucherek, *supra* note 106, at 293.

126. Ucherek, *supra* note 106, at 293.

127. *Mbank El Paso, N.A., v. Sanchez*, 836 S.W.2d 151, 159 (Tex. 1992) (Hecht, J., dissenting).

128. *Id.*

129. *Robinson v. Citicorp Nat’l Servs., Inc.*, 921 S.W.2d 52, 55 (Mo. Ct. App. 1996).

damage claims resulting from acts of their independent contractors may increase the costs and decrease the number of loans they approve for borrowers who rely most heavily on credit. *Robinson* implies that the buck stops at the secured creditor, but in reality, the buck is passed to the potential borrower.

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